TJANTING HANDICRAFT SDN BHD & ANOR

v.

UTUSAN MELAYU (MALAYSIA) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2-23-72-1999]
6 FEBRUARY 2001

TORT: *Defamation - Libel - Publication of libellous material - Whether statements in publication referred to plaintiff - Whether statements defamatory*

TORT: *Defamation - Slander - Slander of goods - Whether statements untrue - Whether amounted to slander of goods under s. 6 Defamation Act 1957*

TORT: *Defamation - Malice - Article written recklessly and untruthfully - Whether constituted malice - Whether defences of justification and fair comment applicable*

COMPANY LAW: *Separate legal entity - Veil of incorporation - Whether plaintiffs single legal entity - Whether corporate veil should be lifted*

The 1st, 2nd, 3rd and 4th defendants were respectively the publisher, editor, journalist and printer of one "Wanita" magazine, which the plaintiffs alleged had published a defamatory article about their batik products. The 1st plaintiff, the manufacturer, and the 2nd plaintiff, its managing director, brought an action against the defendants, praying for damages for slander of goods and for libel, and an injunction to prevent any further adverse publications about their products.

The defendants denied that the words complained of in the article were malicious and referred to the plaintiffs. They admitted that the article contained statements about the batik shirts being unattractive with stale designs and that the shirts did not fit properly because the measurements were inaccurate. However, they relied on the defence of justification and fair comment under ss. 8 and 9 of the Defamation Act 1957 ('the Act') respectively, and contended that since batik was a form of art, they had the duty as responsible journalists to give an honest view of the products.

Held:

[1] On the facts, it was clear that the article would be understood by reasonable people to refer to the plaintiffs. The words in the article in their natural and ordinary meaning were clearly libellous and defamatory as they were meant to show that the goods produced by the plaintiffs were ugly, badly cut and had coarse patterns and colours.

[2] The plaintiffs' batik designs had received praise and commendation from parties specialising in such matters. Hence, taken in its entirety, the defendants' article contained untrue statements about the plaintiffs' goods which amounted to slander of the said goods.

[3] The evidence showed that at the time the 3rd defendant wrote the article, there was a total disregard on her part as to whether it was true or false. This constituted malicious intent and the defences of justification and fair comment therefore failed.

[4] The defendants' submitted that the batik designs were works of art and that their comments constituted a purely subjective and honest opinion of works of art that were open to public scrutiny. However, their comments far exceeded the bounds of fair and proper criticism.

[5] Although there was no fraud, misrepresentation or deceit, the veil of incorporation was lifted as evidence showed that the 2nd plaintiff was the alter ego of the 1st plaintiff and they were in fact a single legal entity.

[Judgment for plaintiffs; RM300,000 for slander of goods, RM700,000 for libel, and RM300,000 as aggravated damages.]

Case(s) referred to:

Burnet v. Wells [1700] 12 Mod 421 ***(refd)***

Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad [1999] 7 CLJ 32 ***(refd)***

David Syme & Co & Anor v. Canavan [1918] 25 CLR 234 ***(refd)***

Egger v. Viscount Chelmsford & Ors [1965] 1 QB 248 ***(refd)***

Hunt v. The Star Newspaper Co Ltd [1908] 2 KB 309 ***(refd)***

Lee Kuan Yew v. Derek Gwyn Davies & Ors [1990] 1 CLJ 583 ***(refd)***

Ling Wah Press (M) Sdn Bhd & Ors v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals [2000] 3 CLJ 728 ***(refd)***

McDonald's Corp & Anor v. Steel & Anor [1995] 3 All ER 615 ***(refd)***

McQuire v. Western Morning News Company Ltd [1903] 2 KB 100 ***(refd)***

Mirzan Mahathir v. Star Papyrus Sdn Bhd [2000] 5 CLJ 507 ***(refd)***

Payne v. Sheffield [1882] 2 EDC 166 ***(refd)***

Rajagopal v. Rajan [1972] 1 MLJ 45 ***(foll)***

Ratus Mesra Sdn Bhd v. Shaik Osman Majid & Ors [1999] 8 CLJ 499 ***(refd)***

Salomon v. A Salomon Co Ltd [1897] AC 22 ***(refd)***

Simpson v. Robinson [1848] 12 QB 511 ***(refd)***

Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor [1973] 2 MLJ 56 ***(refd)***

Terry v. Hooper [1663] 1 Lev 115 ***(refd)***

The Straits Times Press (1975) Ltd v. Workers' Party & Anor [1987] 1 MLJ 186 ***(refd)***

Whitaker v. Bradley [1827] 7 D & R 650 ***(refd)***

Zenobia v. Axtell [1795] 6 TR 162 ***(refd)***

Legislation referred to:
Defamation Act 1957, ss. 3, 6, 7, 8, 9
Federal Constitution, art. 10
Rules of the High Court 1980, O. 78 r. 3(1), (2)

Other source(s) referred to:
Carter Ruck, *Libel & Slander*, 5th edn, p 45

For the plaintiffs - Shamsul-Bahrain Ibrahim; M/s Skrine
For the defendants - M Reza A Hassan (V Vishnu Kumar & Ng Thiang Tuan); M/s Sykt Kam Woon Wah

Reported by Suresh Nathan

JUDGMENT

RK Nathan J:

Facts

The 1st plaintiff at all material times carried on the business of manufacturing batik materials under the trade name of "Tjanting" and the 2nd plaintiff was and is its Managing Director and its alter ego. The 1st defendant, a public listed company, was at all material times the publisher of the daily newspaper known as "Utusan Malaysia" and of a monthly magazine called "Wanita" with a large circulation both within and outside the country aimed and targeted at the women sector of the population. The 2nd defendant was the editor of the said magazine, a post which she had held from August 1993 till September 1999 and had been in the field of journalism for 25 years and the 3rd defendant, its journalist, employed by the 1st defendant and been a journalist for 18 years. In all her years as a journalist the 3rd defendant had also interviewed various prominent personalities, ranging from Heads of States to internationally renowned fashion icons. The 4th defendant was the printer of the said magazine.

In 1998 Malaysia hosted the meeting of the leaders of the 21 countries of the Asia-Pacific Economic Co-operation (APEC) held in Cyberview Lodge at Cyberjaya from 12-18 November 1998. As a gesture of goodwill and friendship, the Malaysian Government presented to each of the leaders a batik shirt and for the lady Prime Minister of New Zealand a batik baju kurung. Indeed all the leaders wore their respective batik shirts and baju kurung during the declaration ceremony held at Cyberjaya on 18 November 1998. The plaintiffs were in fact commissioned by the Ministry of International Trade and Industry (MITI) who entered into a contract with the plaintiffs to supply the said batik attire to the 21 leaders.

It was in respect of these batik shirts and baju kurung worn by the said leaders as shown in a photograph accompanying the said article that the defendants made various comments. In the issue of "Wanita" of February 1999 in an article headlined "ragam" under the by-line of "Bersama Asiah Mion" and written by the 3rd defendant, the defendants published and printed in Bahasa Malaysia and in relation to the quality of the plaintiffs' said products as well as concerning the 2nd plaintiff, the following words:

> APEC
>
> Petang itu di samping bercakap mengenai Bomba seperti lain-lain tempat yang saya pergi, orang tidak lupa bercakap mengenai Amerika. Semua orang marahkan Al-Gore, meluat dengan Malott tetapi saya geram dengan pakaian batik yang dipakai pemimpin APEC. Hodoh. Sampai hati mereka persembahkan kraf tangan kita yang indah dalam rupa yang buruk kepada tetamu negara. Walhal inilah masanya mencanang kecantikan barangan tulen kita.
>
> Setiap kali melihat gambar mereka berbaju batik hati saya sakit. Siapalah yang mencipta batik baju itu? Daripada corak, paduan warna hingga kepada potongan, tidak halus, tidak harmoni, tidak eksklusif, potongan pula tidak terletak di badan, meleweh, melendut, ada gedoboh ada sendat. Ini tidak sepatutnya berlaku. Tolong jangan beri alasan tidak tahu ukuran mereka.
>
> Soal mutu inilah yang sering dirungutkan oleh pengguna. Bukan kerana tidak keupayaan tetapi lebih kepada tahap kawalan mutu. Seperti kata seorang rakyat Singapura, untuk bandingkan barangan Malaysia, Singapura dengan barangan Jepun dan Australia, barangan mereka jauh bermutu tinggi meskipun dijual di pasar raya borong.
>
> Oleh itu jangan cepat berbangga apabila rakyat mulai membeli barangan tempatan. Kerana tanpa mutu peralihan ini hanya sebentar. Itulah sebabnya walau gawat jenama luar negara tetap menjadi igauan, cuma nafsu berbelanja dikurangkan. Dan kemungkinan itu kempen memulau barangan Amerika dan British kurang mendapat sambutan.
>
> Seperti kata teman, tersentuh hati melihat rakyat Iraq, rasa-rasa nak ganyam Amerika dan British. Tetapi tadi pergi Lot 10, yang berkenan beg Liz Claiborne, jaket Donna Karan. Itu belum masuk lagi ke Next atau Laura Ashley. Habis macam mana nak pulaukan barang buatan dua negara ini? Walaupun hati nekad tidak mahu beli, kepala asyik terbayangkannya.

Translated into English by a certified court interpreter, it reads as follows:

> APEC
>
> That evening besides talking about Bomba, everywhere I went people were talking about America. They were all angry at Al-Gore and nauseated by Malott but I was more disgusted with the batik clothes worn by the APEC leaders.

Unsightly. It was unthinkable for them to present our beautiful handicraft in such an ugly fashion to the State guests when it should have been an opportune time to proclaim the beauty of our authentic goods.

Every time I looked at their photographs in batik shirts, I have this resentment. Who on earth created such batik shirts? From the design, combination of colours right up to the style, not refined, not in pleasing combination, not exclusive, the cutting was not made to rest on the body, carelessly done, sagging, some are big and loose and some are tight. This should not have happened. It does not lie in the mouth to say that the measurements were not known.

Quality has always been the main complaint by consumers. It is not due to lack of ability but, rather lack of quality control. As one Singaporean said, in comparison with Malaysia and Singapore goods, Japanese and Australian goods are of far better quality even though they are sold in wholesale market overt.

So, don't be too hasty in taking pride when people start buying local goods. Because without quality, this change is only a short while. For this reason, in spite of economic upheaval people are still raving mad over foreign brands, only the temptation to spend must be reduced and the possibility is that the campaign to boycott American and British goods have little response.

As said by a colleague, it was very touching to see the Iraqis, one was tempted to ganyam *(sic)* the Americans and the British. But just now I went to Lot 10 and found to my taste Liz Claiborne bags, Donna Karan jackets, what more had entered Next or Laura Ashley. So how are we to boycott goods from the two countries? Even though the heart is determined not to buy, they are always on the mind.

Case For The Plaintiffs

The plaintiffs contended that in their natural and ordinary meaning the words referred to meant and were understood to mean as follows:

(1) That notwithstanding the dislike the people felt towards the Vice President of the United States of America, Al Gore, for the remarks he made at the official dinner and also towards the former Ambassador of the United States of America to Malaysia, Ambassador Malott, yet in comparison, the batik materials manufactured and supplied by the plaintiffs ought to cause even greater nausea and dislike.

(2) That the people should address their anger and nausea not towards Al Gore and Malott but towards the plaintiffs and their products.

(3) That the goods produced by the plaintiffs are ugly, hideous and repulsive.

(4) That it was unbecoming of the plaintiffs to present such an ugly and repulsive handicraft to our State guests.

(5) That the pattern was coarse, the combination of colours was not in harmony, that it was not made exclusive and it was not cut to fit the body.

(6) That the shirts and baju kurung were carelessly done, as they were sagging, some looking big and loose and some tight.

(7) That there was no quality control practised by the manufacturers.

(8) That goods made in Japan and Australia sold in wholesale market overt are of higher quality than those produced by the plaintiffs.

(9) That in spite of the economic downturn the people were still craving for and preferred foreign-made goods to plaintiffs' products.

(10) That a campaign to boycott American and British goods received poor response on account of the plaintiffs' goods.

(11) That whilst the sufferings of the Iraqis at the hands of the American and British touched the hearts of the people yet at the same time the American and British also produce goods liked by the people but that the presence of goods produced by the plaintiffs makes the boycott impossible.

(12) That no person in his right mind would produce handicrafts like the ones produced by the plaintiffs.

(13) That the goods are so unsightly that the writer's heart ached every time she looked at the photograph.

(14) That not knowing the measurements of the individuals was not an excuse.

It was the case of the plaintiffs that by the said words, the defendants meant and were understood to mean that the plaintiffs produce unsightly batik shirts and in conduct and manner, the 2nd plaintiff is worse than Al Gore and Malott, and that the 2nd plaintiff had brought shame to the country by allowing the world leaders to wear unsightly and ugly shirts. The contract to manufacture and supply batik shirts to be worn by APEC leaders should not have been given to the plaintiffs as they did not have the capability of producing quality handicraft befitting the country's reputation. Even without the necessary measurements an ordinary manufacturer and supplier of handicraft should be able to manufacture and supply batik shirts bearing good patterns with pleasing

combination of colours, good style, refined and tailor-made to fit the body. On the other hand, what the plaintiffs manufactured and produced were not even fit to be sold at the "pasar malam" (night market). In spite of the economic downturn and because of badly produced products such as those produced by the plaintiffs, the people are forced to rely on branded names from foreign countries. Campaigns by the Government to buy Malaysian goods have not been successful due to the presence of goods produced by the plaintiffs. Even the attacks by the United States and Great Britain on Iraq do not deter the people from buying the aggressors' goods, as the goods produced by the plaintiffs are "hodoh" (unsightly).

The 1st plaintiff thus pleaded that by reason of the said words and in consequence thereof it had been gravely injured in its manufacturing and trading character. The 2nd plaintiff pleaded that she has been seriously injured in her personal business reputation and goodwill and has suffered considerable distress and embarrassment. The plaintiffs thus prayed for:

(1) Against the defendants and each of them:

(a) damages for slander of goods;

(b) damages, including compensatory damages aggravated and exemplary damages for libel.

(2) An injunction to restrain the defendants by themselves, their agents or servants or otherwise from further publishing the said or any other misstatements reflecting adversely on the plaintiffs' said products.

(3) An injunction to restrain the 1st defendant whether by its directors, servants or agents or otherwise howsoever and the 2nd, 3rd and 4th defendants whether by themselves, their servants or agents or otherwise howsoever from writing, publishing and printing or causing to be written, published and printed the words complained of or any other words to the same or any similar effect defamatory of the plaintiffs.

(4) Costs.

(5) Further or other relief.

The Defence

The defendants denied that the words complained of referred to or were understood to refer to the plaintiffs or to any one of them. They also denied that the words bore or were capable of bearing any of the meanings alleged by the plaintiffs. They also denied any allegation of malice on their part. They however pleaded that the meaning as set out by them was true in substance and in fact and that the meaning attributed to the said words were as follows:

(1) That Malaysians were generally angry with Al Gore's and Ambassador Malott's conduct.

(2) However, the 3rd defendant was more concerned with the unattractive batik shirts worn by the APEC leaders.

(3) That it was a wasted opportunity by Malaysians to show-case their local products.

(4) That the photograph in question showed that the design of the batik shirts was ordinary and stale, and that the colours and design did not blend well.

(5) That the shirts did not fit properly because the measurements were not accurate and/or properly taken.

(6) That the sole issue in that portion of the "ragam" column related to the quality of the local manufacturing.

(7) That the quality of local and Singaporean goods was lower than that of foreign goods.

(8) That the quality of Australian and Japanese goods sold at their markets was better than the quality of local goods.

(9) That people, especially Malaysians, would gladly pay more for quality.

There was also reliance on s. 8 (justification) and s. 9 (fair comment) of the Defamation Act 1957 (the Act). It was the case of the defendants that as batik is a form of art, they had a duty, a right and an obligation as responsible journalists to give a frank, fair and honest view of the same within the law because they believed that quality once compromised, would result in the local public preferring foreign goods to local produce and that therefore it was imperative for local manufacturers to endeavour to keep quality at a high level in order to effectively compete with foreign goods. The 4th defendant admitted publishing the words but denied publishing as the author, editor or publisher and relied on s. 7 of the Act (unintentional defamation). It was the 4th defendant's case that as printers they did not intend to print the words complained of concerning the plaintiffs and did not know of circumstances by virtue of which the words might be understood to refer to the plaintiffs. Whilst denying the words were defamatory of the plaintiffs, the 4th defendant pleaded that it had exercised all reasonable care in relation to the publication and that the 4th defendant was only involved as the printers of the "ragam" column in circumstances in which they had no effective control of the contents therein. They also relied on the plea of innocent dissemination.

Findings Of The Court

The Plaintiffs' Rise In The Batik World

The background facts relating to the plaintiffs' case are gathered from the mass of agreed and admitted documents by both parties. The 2nd plaintiff gave to her hand-drawn batik silks and to the 1st plaintiff that was to manufacture and market the products, the brand name of "Tjanting". The business activities of the 1st plaintiff were manufacturing, buying and selling of batik materials, importing and exporting textiles, acting as general drapers, dress makers and haberdashers. Through a cover story of a monthly magazine of November 1986 called "Hawa", "Tjanting" made its debut and the debutante was the 2nd plaintiff herself. The 2nd plaintiff told "Hawa" that she considered every piece of her batik silk as exclusive because it was a one-off design and no two designs were alike and that each piece was made to be the only one of its kind to cater to those who insisted on exclusivity. When asked to compare between her products and those of others, she replied that her products had a strong identity and that she was bold and daring with her colour scheme. According to the admitted cover story she was knowledgeable in fusing colours through the knowledge she had acquired when undergoing courses in cosmetics and decorative ornaments, adornments, makeup and outfitting, whilst accompanying her husband to the United States a few years earlier.

An evening newspaper gave the brand name "Tjanting" another boost when it said that the difference lies in the colour ranges and print used and that the advent of the 1st plaintiff into the batik industry had paved the way towards a more unique and highly styled form of batik. The "Sunday Star" described the 2nd plaintiff as a batik entrepreneur. It was a big surge forward for the plaintiffs when they were given the honour to present "Tjanting" to the Commonwealth leaders and to their spouses during the meeting of the Commonwealth Heads of Government. It was reported in a vernacular newspaper that her creation was not only exclusive but had its own identity and therefore showing that the plaintiffs' batik designs and creations had reached an international level. The international community as represented by the wives of the Heads of the Commonwealth attending CHOGM was captivated by "Tjanting" and in particular Her Majesty Raja Isteri of Brunei Darussalam who bought the entire wardrobe presented. The "Malaysia Tatler" summarised "Tjanting" as simply 'en-tjanting'. It stated that the designer and owner was very innovative and trendy and that the company had really created an interaction of traditional techniques with modern designs to match modern trends. This was in April 1990. On 30 November 1991 the lifestyle section of "The New Straits Times" contained a write-up of both plaintiffs and their hand-drawn silk batiks and the caption given was "A cut above other batik

designers". Under this caption it complimented the 2nd plaintiff for having the knack to blend colours and the skill for creating lines and shape. Under an article called "The Beauty of Batik", the "Her World" magazine of November 1991 recognised the 2nd plaintiff's keen eye for colours and creativity. Another women's magazine called "Famili" described the plaintiff's batik exhibition as "Radiant colours at Tjanting batik exhibition" and stated that most of the guests who attended the exhibition were captivated with the attractive batik designs. In 1992 the 2nd plaintiff even held her own fashion show in Kuala Lumpur.

On 12 June 1992 a vernacular Sunday newspaper "Mingguan Malaysia" produced by the 1st defendant featured a 2-page article wherein it quoted the 2nd plaintiff as saying: "But in whatever circumstances I will still pay special attention to bright and contrasting colours in spite of reluctance on some people to wear them because to me if we want to look beautiful and stand out prominently compared with other people around us, we must put on something different from them, so my batik is for those who want to be seen different." The article continued to quote her as saying that her clientele varied from foreigners to locals, people of high position, dignitaries and Royalties and those who really know how to appreciate good workmanship. The magazine "Nona" in its April 1992 issue featured the 2nd plaintiff, her husband and her family. The heading was "Maintain Tjanting's Identity". It went on to say that "Tjanting" batik was currently not only known in this country but also abroad, such as in New York and Australia. The article commended her on producing exclusive batiks. On 22 November 1993 the 1st defendant through its daily newspaper the "Utusan Malaysia" proclaimed the 2nd plaintiff as "The Personality of the Week" in conjunction with its article on the future of the batik industry. Touching on quality, the 1st defendant agreed with the 2nd plaintiff that in order to maintain a high quality of batik the colours and designs of the batik produced must change to meet current trends and demands. The 2nd plaintiff was also featured again in "Her World" annual 1994 magazine under the heading "Designing Woman". Showing a photograph of the 2nd plaintiff amidst her colourful batik designs the article reported that her fame had spread slowly from word of mouth and that her batik is now well known for its quality, colours and designs. Through the in-flight magazine of the Malaysian Airline System (MAS) "Wings of Gold", both plaintiffs made a breakthrough and "Tjanting" was introduced to both domestic and international travellers with a special message to in-coming flights: "In this country we wear bright colours all year round." "Tjanting" was involved again in another international arena when the Chief Executive Officers and Heads of Business Houses belonging to Young Presidents Organisations visited this country. In recognition of her flair, talent, skill and business acumen, at the 43rd Congress of World Association of Women Entrepreneur, the 2nd plaintiff was bestowed with "The Most Promising Entrepreneur" award.

As the owner and designer of "Tjanting" batik the 2nd plaintiff was complimented by "Nona" magazine in its December 1995 issue for remaining loyal to traditional fashions and keeping to specialisation in designing hand-drawn batik silks for V.I.P. customers. Exactly a year later another magazine "Tiara" devoted two pages to "Tjanting" and its creator, calling the creations and designs as fascinating and stating that they were in vogue with current development in fashion. Citing her full royal title – Tengku Puan Laksamana Perlis Datin Seri Sharifah Hishmah Shahabudin, the Berita Harian of 22 February 1997 said that a person of her birth and who was exposed throughout her life to branded goods, and with such a background, yet it was surprising that she should take a keen interest in local batik instead of falling back to branded goods.

The plaintiffs' international reputation helped MITI to pick the plaintiffs to hold fashion shows for the accompanying spouses of the leaders of APEC and this was followed by a contract awarded to the plaintiffs on 17 July 1998 to supply, (a) exclusive hand-drawn batik silk shirts, (b) exclusive hand-drawn batik silk for a lady, (c) exclusive hand-drawn batik scroll. With reference to these the "Harian Metro", a local newspaper, captioned as follows: "ATTRACTIVE", and complimented the plaintiffs on their design and on the shirts. According to the said newspaper, the plaintiffs were determined to design, sew and produce the best batik silks with a view to promoting the country, in compliance with the theme of the Government, namely, to harmonise with the beauty of nature. The conference of the APEC leaders culminated with the reading of the Declaration at Cyberjaya attended by all the leaders resplendent in their respective batik attire. The official photograph soon appeared in all major newspapers and a copy of that official photograph was presented by MITI to the plaintiffs in appreciation of their work. In fact, the 1st defendant published a photograph of the leaders applauding the Malaysian Prime Minister when he was reading the Declaration.

Has The 3rd Defendant The Expertise To Comment?

The 3rd defendant admitted under cross-examination that she was entitled to comment on fashion as she had acquired knowledge of the fashion world through interviewing international personalities. However, she also admitted that in her column "ragam" she wrote on fountain pens, theatres, restaurants, entertainment, jewellery, and sports. It would seem that the 3rd defendant has certainly presented herself as one well versed in numerous fields of art, fashion and culture. It was the view of the 3rd defendant that the plaintiffs' products as presented to the APEC participants were ugly, hideous and repulsive and that she felt it was unbecoming of the plaintiffs to have presented such ugly and repulsive handicraft to the country's guests. In my view the 3rd defendant has led no satisfactory evidence to show that she is qualified to pass comments

on the plaintiffs' fashion design. Merely interviewing international personalities does not make the 3rd defendant an expert in batik materials to pass such vituperative and castigating remarks. Her attack upon the design, the colour scheme, right up to the cutting, her comment that the attire was not exclusive, that the cutting did not fit the respective bodies, her allegation that the work was carelessly done since some shirts were big and sagging and loose and some tight fitting, were all in my view totally unsubstantiated. In fact the mass media paid the plaintiffs glowing compliments. The large photograph of the leaders resplendent in their colourful hand-drawn batik attire gave a kaleidoscopic picture of the beaming guests against a serene background. There were no complaints even from the recipients of the batik attire or from any other single source except from the defendants. Truly the 2nd plaintiff's expertise in this field is like the fixed Northern Star brilliant in its glow, and the 3rd defendant's, like that of a firefly, spotting a light here and there but only against total darkness. I have set out the 2nd plaintiff's involvement in batik production in extensio and it is clear that she holds the view that her batik design is usually based on current trends in colour and motive but that when an order comes for a specific client, she would try to meet that client's requirement to suit the occasion, the theme, the logo or the corporate colours of the client. In fact the magazine "Hawa" (November 1986 issue) commended the plaintiffs when it said that the advent of Tjanting Batik Sdn Bhd is said to have paved the way towards a more unique and highly styled batik. In fact it is not in dispute that the Sultan of Brunei's wife, Her Majesty Raja Isteri, could not resist buying the entire goods of the plaintiffs on display. This alone ought to speak volumes for the credibility of the plaintiffs' batik attire since the wife of the world's richest man would not spend a fortune unless the goods warranted that price. However, the most exhilarating comment came from the local newspaper the "Berita Harian" when it said, "The colourful batik worn by the leaders of APEC who converged at Cyberjaya to reach a summit declaration in search of a resolution, more particularly on the economic crisis sweeping the world helped to evaporate the tense situation". In fact in comparing the plaintiffs' batik designs with those of others, "The Malay Mail" of 31 July 1987 declared that the difference between "Tjanting" batik and others, lies in the colour ranges and prints used, no doubt through knowledge acquired by the plaintiffs after having undergone courses in cosmetics and manufacturing adornments. The newspapers and magazines were rave with her praise. The "Malaysian Tatler" magazine of April 1990 said, "Her motives and colours are simply 'en-tjanting'". "The New Straits Times" of 30 September 1991 praised her knack for colours.

It is a pity that the 3rd defendant failed to do an in-depth study of the plaintiffs before venturing into hazardous waters by commenting on their products. If the 3rd defendant had read "The New Straits Times" of 30 September 1991 she would have known that the 2nd plaintiff had emphatically stated that she would pay special attention to bright and contrasting colours and that if anyone wanted to look beautiful and stand out prominently he has to wear something different. So her batik no doubt was for those who want to be seen different. In fact in its publication of 22 November 1993 the 1st defendant stated that in order to maintain high quality of the batik, the colours and designs of the batik produced must change to meet current trends and demands. With all these before me I must reject the 3rd defendant's view that the colours are not refined and that they are not in harmony.

As for the exclusiveness of the plaintiffs' batik, the "Berita Harian" of 27 October 1989 observed that batik designs created by the plaintiffs have their own unique character and that each piece carried one single batik design of its own. There were numerous other commendable articles in the Agreed Bundle of Documents praising the plaintiffs' exclusiveness. Therefore for the defendants to suggest that the plaintiffs' batik attire as presented to the APEC leaders lacked exclusivity was totally unacceptable. Besides, if the defendants had only checked their facts before publishing the defamatory article in question, they would have discovered that the offer of a contract by way of a letter dated 17 July 1998 entered into between the plaintiffs and MITI stipulated that the plaintiffs were to supply, (a) exclusive hand-drawn batik silk shirts, (b) exclusive hand-drawn batik silk for a woman with a shawl, and (c) exclusive hand-drawn batik scrolls for the signature of the APEC leaders. The plaintiffs performed the contract and met the terms contained in the letter of offer. In appreciation of the work done by the plaintiffs and in addition to the payment received, MITI presented the plaintiffs with a mounted photograph of the APEC leaders wearing the plaintiffs' hand-drawn batik silks with the following words now translated into English, embossed on the mounted photograph. The words read:

> We would like to place on record our appreciation and extreme satisfaction on Your Highness' co-operation in providing us with your exclusive and high quality batik shirts.

It is ironic that the party that ought to complain has complimented; whilst the defendants with little or no knowledge of the subject matter, have condemned. On the cutting and fitting, again the defendants did not check their facts when they said in the article, "Please do not give excuses that you didn't know the measurements." In fact evidence was led that except for the Chinese Taipei leader and Al Gore of the U.S.A., who were last minute substitutes for the original leaders whose measurements were earlier given, the rest of

the leaders had their attire specially made to measure. The plaintiffs took the trouble to require their tailors to prepare forms requiring details of specific measurements. These forms were sent to all the Embassies and High Commissions which returned the forms filled up with the specific measurements of their respective leaders. The attire was made accordingly. It must also be noted that when the defendants realised, upon seeing these measurements exhibited to the affidavit of the plaintiffs in support of their application for an injunction, they then changed their accusation from not knowing the measurements, to relying on inaccurate measurements.

Therefore the criticisms of the defendants that the cutting was carelessly done, as some were sagging, or big and loose and some being tight, were unfair criticisms not reflective of an honest view. Writers must remember that criticisms cannot be used as a licence to attack the integrity of a person. I can do no better than rely on the words of Collin MR in *McQuire v. Western Morning News Company Limited* [1903] 2 KB 100 when his Lordship said at p. 110, "The view expressed must be honest and must be such as can fairly be called criticism". In my view the impugned article fell outside the limit of honest criticism.

Malice

The rhetorical question posed by the 3rd defendant in her article, "Siapalah yang mencipta batik baju itu?" was obviously not a question but loaded with sarcasm and PW1 saw it clearly for she said in evidence, "I have been made to suffer sarcasm." There is no satisfactory evidence of the 3rd defendant's so-called expertise to comment on the plaintiffs' goods. Indeed to my mind the 3rd defendant was as much an expert in hand-made batik silk as she portrayed herself to be in fountain pens, theatres, restaurants, jewellery and even in sports. The 3rd defendant aptly fits the saying, "Jack of all trades but master of none." In my view there can be no other conclusive evidence of malice than evidence that shows that at the time the 3rd defendant wrote the article complained of she knew it to be untrue. One look at the photograph of all the leaders shows even to a lay person that the charges levied against the plaintiffs by the defendants have not been borne out. The material and pattern were approved by MITI and as compared to the expertise of the 2nd plaintiff in the field of batik, the 3rd defendant has no stature.

Surely the defendants ought to have known that the vitriolic verbiage of condemnation heaped upon the plaintiffs in the impugned article could not have been true, more so when the 1st defendant had itself edited and published articles in adulation of the plaintiffs' craftsmanship in the field of batik design.

Therefore when there is recklessness in the publication with total disregard as to whether the statement is true or false, then it is fair and proper for the court to hold malicious intent. In this case, notwithstanding the total casual recklessness in the publication, the defendants had also laced such conduct with bitter sarcasm. In fact DW2, the editor of the magazine admitted that she didn't edit the said magazine as at that material time she was on leave. However, in an affidavit filed by her to be used during the proceedings DW2 stated with regard to the article, that it was merely an opinion of the 3rd defendant. When asked under cross-examination what she meant by that, she refused to answer that question. In any case she admitted that the publication was her responsibility. DW3 who testified as the representative of the 1st defendant said she felt "sakit hati" when looking at the picture of the APEC leaders in their respective batik attire. She also maintained that the batik attire was either not fitting (gedoboh) or tight (ketat). DW3 testified that at the material time, as the Deputy Head of Magazine Section it was her duty to control all publications of the 1st defendant including the magazine "Wanita" and in that capacity it was well within her right to be able to overrule the 2nd defendant, the Editor. Her deliberate and well-chosen answers clearly suggested an unrepented defendant. When asked in cross-examination whether it was true that goods sold at the major wholesale markets (pasaraya borong) were of better quality than the plaintiffs' baju batik "Tjanting", she subtly answered yes. This is the kind of reckless conduct of a head of a department that ought to bring about an award of punitive damages.

The pen is indeed mightier than the sword and those who wield the former must do so temperately, guided by the norms of civility, honesty and integrity. As for the 4th defendant, its representative DW4 admitted gain through the publication and further admitted that it would publish whatever is given for publication.

At the closing ceremonial dinner given by the Government of Malaysia, Al Gore made his infamous faux pas when he commended the voice of the Reformasi group. From then on the voice of the general public was heard in full condemnation of both Al Gore and his Ambassador Marlott. However, there is no doubt that by the time the impugned article was written the public outcry was receding from a crescendo to an occasional drip. But about two months later in its February 1999 issue, the 3rd defendant revived the public dislike of the conduct of Al Gore and Marlott by equating that dislike by the public to the dislike she felt upon seeing the plaintiffs' batik on the leaders. It is clear that the defendants used the heat of the public anger at Al Gore and Marlott to forge their libellous attack on the plaintiffs.

Identity Of Party

In an action for slander of goods for libel it is not necessary that the words should refer to the plaintiff by name, so long as the words would be understood by reasonable people to refer to the plaintiff. The court must be satisfied as to whether the libel designated the plaintiff in such a way as to let those who know him understand that he was the person referred to. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person being referred to. This is what the Australian High Court meant when it said in *David Syme & Co & Anor v. Canavan* [1918] 25 CLR 234 at 238:

> … The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognised; and whether that description takes the form of a word picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances, the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him.

To my mind, there is no doubt that the article referred to and was understood to refer to the plaintiffs.

In their natural and ordinary meaning, the words in the article were understood to mean that whilst the general public was averse to the display of rudeness by Al Gore and his Ambassador Malott, the defendants were equally averse to the display of the plaintiffs' batik. The article was also meant to show that the goods produced by the plaintiffs are ugly, hideous and repulsive and further that it was unbecoming of the plaintiffs to have presented such goods (as compared to goods purchased at wholesale markets) to the State guests. The words in their natural and ordinary meaning meant that the patterns were coarse, the combination of colours were not in harmony and that they were not exclusive and not well cut. There was the impression given that the plaintiffs lacked quality control because goods made in Japan and Australia and which could be obtained at the wholesale markets were of better quality than those produced by the plaintiffs and that indirectly the plaintiffs were virtually affecting the economy of the country by forcing people to buy foreign goods due to the apathy of the plaintiffs. There is no doubt in my mind that the words complained of are indeed defamatory of the plaintiffs in their ordinary meaning. I agree with and accept the test propounded by Azmi J (as he then was) in *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 wherein his Lordship said at p. 58 as follows:

> Thus the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true.

Thean J in *The Straits Times Press (1975) Ltd v. Workers' Party & Anor* [1987] 1 MLJ 186 said at p. 188 as follows:

> … The natural and ordinary meaning is that which would be reasonably understood by ordinary persons using their general knowledge and common sense, and this includes any inference which can be reasonably drawn from the words:

I agree with and accept this statement. Of course such meaning as is to be given, and such inference as is to be drawn, must be by the well-known reasonable man of ordinary intelligence.

Slander Of Goods

The law relating to slander of goods is covered by s. 6 of the Defamation Act 1957, which reads as follows:

> 6. Slander of title, etc
>
> (1) In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage –
>
> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
>
> (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.
>
> (2) Section 3 of this Act shall apply for the purposes of this section as it applies for the purposes of the law of libel and slander.

I am satisfied that there has been publication by the defendants of the plaintiffs whereby the defendants maliciously published false statements disparaging the plaintiffs' hand-drawn batik silks under the brand name "Tjanting". I am also satisfied that the plaintiffs had alleged and proved that the article was published concerning the plaintiffs' goods, that the said publication was false and that it was published maliciously with the intent of injuring the plaintiffs. When the defendants asked the question, "Who on earth created such a batik shirt?", there is no doubt in my mind that such a caustic remark was aimed at disparaging the plaintiffs' goods. It was a stinging rebuke directed at the 2nd plaintiff as the designer and creator and at the 1st plaintiff as the producer and manufacturer of the hand-drawn batik attire. As I had already found such

statements to be false and untrue, they no doubt amount to slander of the plaintiffs' goods. When the plaintiffs' goods were compared to those that could be bought at wholesale markets like as if they are being mass-produced, unlike the plaintiffs' products which are hand-drawn and with individual taste and flavour, then clearly the goods themselves have been slandered. It is trite law that in an action for slander of goods the untrue statement must refer either directly or by inference to the plaintiffs' goods. Where the statement disparages the goods and the producer, then an action in libel will lie. Therefore in this case I find that the plaintiffs have indeed established their case for slander of goods.

The defence available is what is called 'trader's puff' which is a mere exaggeration of the qualities of the defendants' goods over that of the plaintiffs'. Unfortunately in this case the defendants are not involved in the manufacture or designing of hand-drawn batik silks. I therefore find the case of the plaintiffs proved against the defendants in respect of the tort of slander of goods.

It is a known fact that women use batik silk more than men. In the earlier days whilst it was most common to see Malay ladies and women of fashion using batik silk for their baju kurung and kebayas, today riding upon nationalistic fervour, most Malaysian women be they Malays, Chinese or Indian, use batik silk material to make their evening wear. The attack upon the plaintiffs' goods in the women's magazine "Wanita" was no doubt meant to target the women readers. Based on the glowing tributes I had recounted from various newspapers and magazines, there was no doubt that at least prior to the publication of the impugned article, the plaintiffs' trade name "Tjanting" was cresting the wave of the batik industry. These are the factors the court has to consider when it comes to deciding on the award of damages.

The defendants submitted that in order for the plaintiffs to establish the tort of slander of goods, the plaintiffs are required to prove and to satisfy the existence of malice and falsehood and that the entire article concerned must be false and malicious in nature. On the evidence, it was submitted by the defence, that the entire article only concerned the opinion of the 3rd defendant and her views on the current state and quality of the locally manufactured goods. Unfortunately, the defendants had failed to substantiate with illustrations. It is true that the plaintiffs did not have the measurements of Al Gore of the United States. But that was because he was a last minute substitute. In any case, even Al Gore's shirt, in my view, fitted him to a 'T'. Besides, there was no complaint from Al Gore nor from the United States Government.

Libel

Bayley J said in *Whitaker v. Bradley* [1827] 7 D&R 650 as follows:

> … Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable.

In *Terry v. Hooper* [1663] 1 Lev 115 the court held that "it makes no difference that the trade is bad, so long as it is lawful." Thus it is actionable to say of a merchant or tradesman that "he hath nothing but rotten goods in his shop." (See *Burnet v. Wells* [1700] 12 Mod 421.) I am satisfied that since the defendants had published in the newspapers and read by the general public, words containing an untrue imputation against the reputation of the plaintiffs, the defendants have indeed defamed the plaintiffs. As for malice, evidence was led by the 2nd plaintiff that she had instructed her solicitors to send the letter dated 16 March 1999 before commencing action. When there was no response her present solicitors sent a second letter dated 15 July 1999 demanding a retraction and an apology. There was also no response to this letter. In *Simpson v. Robinson* [1848] 12 QB 511 the court held that where justification had been pleaded as a defence and the plaintiff during the trial had offered to accept an apology and a verdict of nominal damages, if the defendant would withdraw the plea of justification, and which the defendant refused to do, though he did not attempt to prove it, the court held that such a conduct on the part of the defendant was evidence of express malice and that such conduct ought also to have a bearing on damages. I have already dealt with the issue of malice earlier.

I am satisfied that the writing, printing and publication of the words complained of were done to seek sensationalism, solely motivated by a desire to boost the sale of the magazine "Wanita" and to live off the ruin of the 1st plaintiff's manufacturing and trading character and the loss of the 2nd plaintiff's reputation. Not only were the defendants callous of conduct but were also indifferent to promulgating injurious falsehood and oblivious to the fact that the words are untrue. The said words were calculated to slander the 1st plaintiff's goods and to disparage the 2nd plaintiff in her profession.

The Article Must Be Considered In Its Entirety

In support of this argument the defendants relied on my own decision in *Ratus Mesra Sdn Bhd v. Shaik Osman Majid & Ors* [1999] 8 CLJ 499. The defendants thus urged upon me that I ought not to consider words and phrases in the article in isolation from the rest of the article because whilst some sentences may, standing on their own, be considered to be defamatory, the presence of other passages may take away the sting of the allegedly defamatory

sentences. Urging me to rely on the objective test, which I applied in *Ratus Mesra*, the defendants argued that the meaning of the words in the article should be considered and interpreted in a manner such words would have, upon the reasonable man on the street. In support of this counsel for the defendants took a very unusual stand. He argued that no weight be placed on the English translation of the article concerned as the man on the street upon reading the article would not translate the article into English and then decide whether it is defamatory of the plaintiffs. He submitted that the man on the street would just read the article concerned, namely, the Bahasa Malaysia version, and then conclude at that particular moment whether the article is defamatory or not. This was because the defendants had not agreed to the English translation.

Encik Shamsul Bahrain for the plaintiffs, with his usual candour pointed out that during the first case management of the case I had asked counsel for the defence if he agreed to or disagreed with the translation. Counsel did not disagree with the translation. I had also during my directions in respect of the submissions, indicated to both parties that notwithstanding the finality of the submissions, if either party felt at any time that the other party had misinformed the court or had misled the court in any material issue, the said party was welcome to write to the court with any necessary clarification. Since counsel for the defence had not written to the court denying this contention of counsel for the plaintiff, and since I myself do recall giving such directions, it is my judgment that counsel for the defendants is wrong to now resile from his earlier agreement that he had no qualms with the plaintiffs' translation. In any case, the translation is not an allegation or an assertion. It is to my mind a literal translation. In *Zenobia v. Axtell* [1795] 6 TR 162 the court held that the plaintiff should have set out the original words and then have them translated in the way applicable to him. In considering all aspects of the defendants' submission on this score I find that the article when considered in its entirety is defamatory of the plaintiffs. It is now necessary to consider the pleaded defences.

Justification

Once justification is pleaded then invariably the burden lies upon the defendant to establish a case of justification. It is no longer the duty of the plaintiff to prove that the defamatory words are false because the law will presume this in its favour. In *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr. Mahathir bin Mohamad* [1999] 7 CLJ 32 I said in respect of a plea of justification at p. 39, as follows:

> At common law the defendant was required to prove the truth of all the material statements in the libel. However, by virtue of s. 8 of the Defamation Act 1957 ('the Act'), the defence of justification 'shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.' It follows therefore that what is true, cannot be defamatory. This must be on ground of public policy because the exposure of truth must be paramount when compared to that of reputation. Therefore, clearly there can be no room even for malice if the matter published is found to be true.

The defendants' task is to prove that the defamatory imputation is true. In fact it is my judgment that a plea of justification ought not to be raised unless the defendant has cogent evidence in support of such a plea. In their particulars pleaded in support of the plea of justification the defendants maintained that the batik shirts were ordinary and stale and that the colours and designs did not blend well, that the shirts did not fit properly because the measurements were not accurate and/or properly taken. As I had held earlier, the defendants have totally failed to justify their plea. The presumption of the falsity of their allegations held in favour of the plaintiffs by the raising of the defence of justification, has not been rebutted by the defendants.

In raising the defence of justification the defence submitted that the 2nd plaintiff had during the cross-examination testified that she did not have the measurements of Fujimori of Peru, Jenny Shipley of New Zealand and Dr. Mahathir of Malaysia and of course the measurement of Al Gore was also not with her. Even assuming the plaintiffs did not have the measurements of the personalities mentioned, there was nothing in the attire worn by them to suggest the inference imputed by the defendants. In any case the plaintiffs said that they had prepared so many shirts for Dr. Mahathir that his measurements were familiar to them. Al Gore was a last minute substitute. The plea (as found in para. 13 of the defence) alleging that the charge was true in substance and effect must mean that each of the particulars of the charge was true in substance. In any case, the particulars as set out under this plea did not contain facts relied upon in support of the plea of justification. It is my finding that the defendants had failed to confine their evidence strictly to the particulars of justification as set out in their defence. The libel contains numerous charges but the defendants were unable to prove any of them as true and neither have they pleaded some other defence such as qualified privilege. The authorities are clear in that any statement which alters the character of the main imputation or adds to its sting must be proved to be true; otherwise the defendant will fail in this plea. In *Mirzan bin Mahathir v. Star Papyrus Sdn Bhd* [2000] 5 CLJ 507 I had held that the defendant must not put in a plea of justification lightly or without carefully considering the available evidence

before him and as to such evidence as would be likely to be available to him. A defendant setting up a plea of justification must plead his case with sufficient particularity, without circumlocution or obfuscation, so as to enable the plaintiff to know the possible defamatory meaning of the words complained of, which the defendant is seeking to justify. When a defendant by its Lucas-Box meaning or in reliance of its particulars of justification, makes a serious allegation of dishonesty or other improper conduct, even suggestive of acts of corruption, the obligations become even more compulsory and obligatory upon the defendant. The particulars pleaded must support the defendant's Lucas-Box meaning so that if any particulars fall outside the ambit of the Lucas-Box meaning, such particulars ought to be struck out and/or if the Lucas-Box meaning makes any allegation which is unsupported by the particulars, that part of the Lucas-Box meaning should equally be struck out. In any case I had already held that the defence of justification has been defeated by the presence of malice.

Bare Denial To The Plea Of Innuendo

The plaintiffs had in para. 7 of the statement of claim pleaded innuendo and gave detailed particulars of the innuendo as is required by O. 78 r. 3(1) of the Rules of the High Court 1980 (the RHC). The defendants' response to this was a bare denial of the meaning and understanding attributed to the words of the plaintiffs. The defendants ought to have realised that in many cases the words complained of in a libel or slander suit may be defamatory of the plaintiff both in their natural and ordinary meaning and also by way of an innuendo meaning. Carter Ruck on *Libel & Slander* 5th edn. states at p. 45 that, "In such circumstances, the innuendo meaning constitutes a distinct and second cause of action for which a separate award of damages can be claimed." In this case since there is a mere denial of the innuendo the plea of justification must fail if the words are found to bear that meaning. However, having read the entire defence again I will accept para. 13 of the defence with its particulars, as entering a plea of justification to the innuendo meaning alone. However, having considered the particulars pleaded in their entirety I am satisfied that the defendants have failed to justify the innuendo meaning as maintained by the plaintiffs.

Fair Comment

By para. 15 of the defence, the defendants plead fair comment upon a matter of public interest, namely, the local manufacturing industry. A comment is a statement of opinion based on facts. Therefore a libellous statement of fact cannot form the basis of a fair comment. In respect of fair comment O. 78 r. 3(2) of the RHC reads as follows:

(2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

Whilst the defendants had given particulars of the facts on which they rely, yet they failed to comply with O. 78 r. 3(2) in not stating "which of the words complained of they allege are statements of facts and of the facts and matters they had relied on in support of the allegations that the words are true". A defendant should not enter a plea of fair comment unless he is satisfied that the facts which are relied upon in support of the plea are true and that he has reasonable evidence to support them or reasonable grounds for believing that he has sufficient evidence to prove them at the trial. In *McDonald's Corp & Anor v. Steel & Anor* [1995] 3 All ER 615 CA, Neill LJ said at p. 622 as follows:

It is to be remembered that the defences of justification and fair comment form part of the framework by which free speech is protected. It is therefore important that no unnecessary barriers to the use of these defences are erected, while at the same time the court is able to ensure that its processes are not abused by irresponsible and unsupported pleadings.

In any case the Federal Court decided in *Rajagopal v. Rajan* [1972] 1 MLJ 45 that where there is malice established the defence of fair comment cannot succeed and since I have already found earlier, evidence of malice in this case, this defence of fair comment must therefore necessary fail.

Citing art. 10 of the Federal Constitution which guarantees freedom of speech of the citizens, the defendants urge upon me to hold that the defence of fair comment lay open to them. Whilst I agree that freedom of speech ought not to be curtailed yet unbridled freedom to speak with no constraints can lead to chaos. In considering the same issue I had said in *Ratos Mesra* at p. 507 as follows:

… Whilst I agree that this case relates primarily to the right or otherwise of a trial judge to grant injunctive relief, I am emboldened by the views of the highest court that in applying the principle of allowing the defence of fair comment, the court is thus placing greater emphasis on freedom of speech relating to the freedom of the press when comparing and balancing the damage or wrong, if any, that can be caused to the reputation of a single individual or a company who/which if wronged, can be adequately compensated by way of damages. Subject to the caveat that if one transgresses the borderless line

> of freedom of speech and enters the uncharted mind-field of malicious libel or slander, one is liable to face a suit for defamation, the court must, in order to ensure that there is no such transgression, stand as a silent sentinel, ever vigilant, never indolent, as a bulwark towards freedom of speech.

The 3rd defendant's argument that she was merely exercising her constitutional right upon a matter of public interest and that her opinion was but an honest one, must be scrutinised in line with all the surrounding circumstances and the entire article. Whilst there is certainly no constraint on freedom of speech, there are limits to it. It is a borderless limit and it calls for extreme caution on the part of the defendants. In this case I find having considered the law relating to fair comment and freedom of speech that the defendants had indeed with malicious intent transgressed the border and maligned the plaintiffs. The choice of words used by the defendants was in my view inspired by malice because it exceeded the limit of fair comment since the language used and I quote the Bahasa version, namely, "sakit hati melihat", "siapalah yang mencipta baju batik itu", "corak tidak halus", "paduan warna tidak harmoni", "tidak eksklusif", "potongan meleweh, melendut, gedoboh, sendat", "tidak bermutu", "barang yang dijual di pasaraya borong lebih bermutu" are certainly words that tend to denigrate the plaintiffs in the world of batik fashion. Clearly the views expressed by the defendants were not honest when others had expressed warm approval and admiration of the plaintiffs' designs. It is my judgment that the views expressed far exceeded the realm of fair and just criticism. It is perhaps appropriate to quote at this stage the words of Fletcher-Moulton LJ in *Hunt v. The Star Newspaper Company, Limited* [1908] 2 KB 309 at 320:

> … Any matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment, and not statement of fact, cannot be protected by the plea of fair comment.

To my mind, the defendants published the criticism with reckless indifference as to whether they were true or not. In my judgment, the language used was so extreme that no fair-minded person however obstinate and prejudiced his views were would have honestly used them. There can be in my opinion no room for an inference that the article in question was in fact the genuine expression of the defendants' views. It must be remembered, and more so by the defendants, that freedom of speech is not a licence to defame. In recognising this, the Federal Court in *Ling Wah Press (M) Sdn Bhd & Ors v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* [2000] 3 CLJ 728 said at p. 737 as follows:

> … We are of the view that freedom of speech is not an absolute right. Freedom of speech is not a licence to defame people. It is subject to legal restrictions. An absolute or unrestricted right to free speech would result in persons recklessly maligning others with impunity, and the exercise of such right would do the public more harm than good. Every person has a right to reputation and that right ought to be protected by law – *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew & Anor* [1992] 2 SLR 310 at 332.

Work Of Art

The defendants submit that batik design is a work of art. The 2nd plaintiff under cross-examination agreed. I have no hesitation in concluding that batik works ought to be classified as works of art. The defendants thus argue that as batik is a form of art a view as to whether it is good or otherwise would depend purely on the opinion of the individual concerned. In other words, the submission was for the court to apply the subjective test. The defence submitted that their comments on the plaintiffs' batik were nothing more than the 3rd defendant's honest opinion in respect of a work of art that had been presented to the public. The defence relied on *Payne v. Sheffield* [1882] 2 EDC 166 where Barry JP said, "Any matter brought before the public so as to invite criticism on it may be commented upon …". Whilst criticisms are acceptable it is my judgment that there must be a basis for a fair and just criticism. I had already in the earlier part of this judgment dealt with just criticism. I am of the view that the caustic and cruel comments of the defendants in respect of the plaintiffs' hand-drawn batik far exceeded the bounds of fair and proper criticism.

Alter Ego

The plaintiffs have claimed that the 2nd plaintiff is the alter ego of the 1st plaintiff. In essence, this means I have been asked to lift the corporate veil of the 1st plaintiff. On the other hand, the defendants argue that based upon the celebrated case of *Salomon v. A. Salomon Co Ltd* [1897] AC 22, unless there was fraud, misrepresentation or deceit I ought not to lift the corporate veil. It seems to me that the defendants have misconstrued the reasoning in *Salomon*. In my view the case of *Salomon* must be looked at in relation to the true intent and meaning of the Companies Act. In fact Lord Halsbury LC said at p. 30 as follows:

> … once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

Again counsel for the defence has not taken the challenge during case management, nor during cross-examination when he took the challenge only in submission that, "Syarikat Batik Tjanting" as referred to by MITI in its letter of appreciation and "Batak Tjanting" as is referred to in the contract to supply from MITI to the 2nd plaintiff referred to different parties. The defendants' submission that there was no reference at all to the 1st plaintiff as named in the writ is contrary to the principles of case management. The defendants never raised a whimper during case management that in their view all references in the Common Agreed Bundle of Documents were not meant to refer to the 1st plaintiff. It is totally unfair and unjust of the defendants to take such a challenge during submission. I accept from the evidence adduced that the 2nd plaintiff was the alter ego of the 1st plaintiff. In fact without the 2nd plaintiff's royal heritage, her managing directorship, her own interest and training that she had brought into the company, the 1st plaintiff would have been nothing more than another company amongst the multitude of companies dealing with batik silk. The exclusiveness of the 1st plaintiff's "Tjanting" was brought about due to the personality of the 2nd plaintiff. I had watched the 2nd plaintiff testify. In the face of hearing verbal condemnation of her materials, she maintained a serene and regal composure. She testified without calumny or hatred. In spite of forceful cross-examination she maintained a composed dignity and answered always with utmost civility. The agreed and admitted documents in the Common Agreed Bundle of Documents were rhetoric with adulation over her batik designs. To my mind this is the type of case other than those relating to the Companies Act, where the corporate veil ought to be lifted because the 1st plaintiff is a nonentity without the 2nd plaintiff. If facts were to be stated it is in evidence too that out of 10,000 ordinary shares of the 1st plaintiff she owns 9,999. She is also therefore the near absolute owner of the 1st plaintiff.

Conclusion

Having considered the entire evidence and the submissions of all the defendants I have no hesitation in finding all four defendants as publisher, editor, writer and printer, respectively, liable. I find all defendants liable because they have taken part in publishing it or in ensuring its publication. The proprietor of a newspaper is liable even though the libel may have been published without his knowledge or even in his absence because the editor is his servant and it is within the scope of his employment to send to the printers whatever he thinks ought to be published. In *Lee Kuan Yew v. Derek Gwyn Davies & 3 Ors* [1990] 1 CLJ 583 there were four defendants all connected with an article published in the Far Eastern Economic Review. The 1st defendant was the editor, the 2nd defendant was the author of the article entitled "*New Light*

On Detention", whilst the 3rd and 4th defendants were the publisher and the printer respectively. The defence of fair comment failed for want of merit and the lack of sufficient substratum of facts on which to base the comment. In dealing with express malice LP Thean J said that if express malice was proved against the editor and the author of the article, then the publisher would be liable vicariously on the basis of respondeat superior. The learned judge was guided by the words of Denning MR in *Egger v. Viscount Chelmsford & Ors* [1965] 1 QB 248 at 265 which reads:

> … A defendant is only affected by express malice if he himself was actuated by it: or if his servant or agent concerned in the publication was actuated by malice in the course of his employment.

The learned judge considered first the question of express malice in respect of the editor and the author. As the editor he would have considerable say on the content of the article, and in his hands would rest the final decision whether or not the article or any part thereof should be published. Both of them were in the employment of the publisher. In conclusion on the material before it the court found that the editor and author were actuated by express malice. Accordingly the learned Judge held that since the publisher was affected by the express malice of the editor and the author he was vicariously liable.

In dealing with the printers it was clear that they were not involved in the writing and in the editing. However, the printers printed the article without verifying whether the contents therein were true or false. Notwithstanding the fact that there was an agreement subsisting between the publishers and the printers wholly for commercial reasons with regard to indemnity, they had therefore tied themselves to the publishers and must stand or fall with the publishers. They printed the article, without considering or caring whether it was true or false and they were indifferent to the truth. They were therefore equated with the publishers who published materials or articles without considering or caring whether they were true or false. In that sense they acted tactlessly. The learned judge concluded that for those reasons the printers were also actuated or affected by express malice. On the same basis I find all the defendants liable to the plaintiffs in this case.

Damages

There is no doubt that for defamation the primary remedy is an award of damages. Since slander of goods falls within s. 6 of the Defamation Act 1957 no special damages need be proved. It is slander *per se*. Whilst the suit contains a claim for slander of goods in respect of the 1st plaintiff and for libel in respect of the 2nd plaintiff, needless to say since I have already found

a case for innuendo, this can give rise, as I had found earlier, to separate causes of action in respect of each of the plaintiffs. However since the plaintiffs have not applied to amend to include separate causes of action for innuendo, I shall not consider separate awards under this head.

In considering the proper award of damages the court is entitled to take into consideration of the plaintiffs, their position and standing in society, the nature of the libel, the mode and extent of the publication, the absence of any retraction or apology, the obviously untenable defences maintained, the arrogant attitude of the defendants when contrasted with the meekness and anguish shown by the 2nd plaintiff at the trial. The article under the heading "APEC" is a grave slander of the 1st plaintiff's goods and liable upon the 2nd plaintiff. The words complained of had cast serious imputations on both the plaintiffs as manufacturers of goods for people in high society. Both the slander of goods and the libel appeared in a reputable and influential publication with nation-wide circulation including Singapore and Brunei Darussalam. The magazine "Wanita" is not a sensational daily tabloid; it is a monthly periodical magazine and is read generally by women from all strata of life.

I am not unmindful of the view that "damages must not be awarded at a level which goes beyond what is necessary for the legitimate protection of reputation and which might stifle the free expression of opinion". The defendants urged upon me to consider the fact that the article in question did not in any way attack the integrity or damage the reputation of the plaintiffs personally and that therefore damages must not be excessive. However, I must also bear in mind that the entire conduct of the defendants, as seen through the evidence of DW1, DW2, DW3, from the time when the libel hit the newspaper stands down to the very moment of the last witness of the defence, did not reflect any concern for the protection of the plaintiffs' reputation. The defendants through DW1 and DW2 adamantly maintained their libellous view. When action is brought in respect of both slander of goods and libel, the court may take into consideration in assessing damages, both the mental distress and illness caused to the plaintiffs as a result of the publication. And in this case the double blow suffered is by the 2nd plaintiff. I am of the view that the award of damages must be sufficient to convince any person of the baselessness of the libel and ought to show the public the vindication of the plaintiffs' reputation.

General Damages

General damages serve three functions:

(1) To act as consolation to the plaintiffs for distress suffered from the publication.

(2) To repair the harm to the reputation (including the business reputation).

(3) As a vindication of the reputation.

It is my considered opinion that the defendants ought to pay the 1st plaintiff a sum of RM300,000 as damages for the slander of goods and a sum of RM700,000 to the 2nd plaintiff as damages for libel.

Aggravated Damages

I find that there is indeed a case for aggravated damages for both the plaintiffs against all the defendants. As I had said earlier, the defendants had themselves published articles in adulation of the plaintiffs' workmanship in the field of batik design. Had they taken the trouble to check their records they could have at least given a comparative study of the plaintiffs' earlier handiwork which elicited praise and the decline or shoddiness of work if any as to cause the impugned comment. At least the plea of fair comment would have meaning to it. On the contrary the defendants were blowing hot and cold; in earlier publications they praised the plaintiffs and in the impugned article the plaintiffs faced unbridled criticism. This indifferent attitude of the defendants can only be attributed to a lackadaisical attitude towards hurt feelings. In fact the 3rd defendant who represented the 1st defendant said she felt "sakit hati" when she looked at the picture of the APEC leaders in their respective batik attire. When asked why she said so, it was because the batik attire was either not fitting (gedoboh) or tight (ketat). When asked in cross-examination whether it was her view that the goods sold at the major wholesale markets (pasar borong) were of better quality than the plaintiffs' baju batik "Tjanting", she said yes. And this comment was made by this witness who gave no evidence as to her ability to make such painful comments.

The defendants sensationalised their publication with scant regard to the hurt and discontent such publications would cause. The defendants knew or ought to have known that all of their allegations, namely, that the hand-drawn batik shirts were ugly, that the style was not refined, that the combination of colours was not in harmony, that they were not exclusive, were sagging with some being over-sized and some being tight and not fitting, that all these allegations, were untrue. I have seen the large photograph of all the dignitaries in their batik attire and they looked resplendent. The 2nd plaintiff has been bestowed

the title Dato' Paduka and is known as the Tengku Puan Laksamana Perlis. She is the alter ego of the 1st plaintiff. The castigating remarks upon her brand "Tjanting" which she nurtured to fame, were totally unjustified and intemperate. In the circumstances, I am satisfied that an award of RM300,000 to the 2nd plaintiff as aggravated damages is fair and reasonable. The plaintiff will also have the injunctions as prayed for.

There will be interest on the awards at 4% per annum from date of publication to date of judgment and costs.